SUPREME COURT, U. S.
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In The

Supreme Court of the United States

October Term, 1974

No. 74-1480

FORREST GERRY, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No.

FORREST GERRY, JR.,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO: The Honorable, the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court.

The petitioner, Forrest Gerry, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 28, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet recorded, appears in the Appendix hereto. No opinion was rendered by the Distict Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 28, 1975 by order dated April 11, 1975, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether this Court's supervisory power over the administration of justice in the federal courts requires reversal of petitioner's conviction and dismissal of the indictment against him where the prosecutorial team:

a) instructed a prospective witness to falsely deny that any promise had been made to him about the sentence that he would receive in his own case;

b) advised a prospective witness, that it controlled the judge in regard to sentencing of cooperative prosecution witnesses; and

c) suggested testimony to a prospective witness?

STATUTE INVOLVED

Section 224 of United States Code, Title 18:

"a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

b) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, territory, Commonwealth, or possession of the United States, and no law of any State, territory, Commonwealth, or possession of the United States, which would be valid in the absence of the section shall be declared invalid, and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section.

c) As used in this section —

(1) The term 'scheme in commerce' means any scheme effectuated in whole or in part

through the use in interstate or foreign commerce of any facility for transportation or communication;

(2) The term 'sporting contents' means any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence;

(3) The term 'person' means any individual and any partnership, corporation, association, or other entity."

STATEMENT OF THE CASE

Petitioner was indicted in the Eastern District of New York together with twenty-seven other persons in a two count indictment charging conspiracy to influence the outcome of harness races by bribery (18 U.S.C. §224) and a substantive charge of influencing the outcome of harness races by bribery (18 U.S.C. §224). After an eleven week trial, petitioner and co-defendant Perry were convicted of both charges; as to the remaining twenty-six defendants: fourteen were acquitted by the jury, the trial judge directed verdicts of acquittal for five, two pled guilty, and five were severed. On July 19, 1974, petitioner was sentenced to concurrent terms of four years imprisonment on each of two counts, and was also fined $10,000 on each count.

1. Essentially, the government's proof related to a scheme to unlawfully fix the "superfecta" race, a type of harness racing. The definition of a superfecta race and the effect on the betting odds of eliminating from consideration one or more horses in the race is set forth in the opinion of the Court of Appeals (Appendix A, *infra*, 3a-5a). The government's case, although subject to sharp defense attacks on the credibility of its witnesses, was, when viewed in the light most favorable to the government, sufficient to establish petitioner's participation in a sports bribery scheme.

An unusual event occurred during the course of the trial. On April 16, 1974, during the presentation of the government's case, Joseph Pullman, a co-defendant whose case had been severed with the expectation that he would plead guilty and testify for the government, came to the office of petitioner's attorney (T6432, 7285-6).[1] There, Pullman advised petitioner and petitioner's attorney that during its preparation of trial witnesses, including Pullman, the government was making improper and coercive remarks (T7285-6). Petitioner's attorney requested Pullman to record the statements of the prosecutor and his staff by wearing a concealed recording device during his future visits to the prosecutor's office (T6902-3, 6907-9). Pullman agreed to do so and on visits to the prosecutor's office on April 18, 19, 21, 1974, he recorded conversations involving, at various times, the prosecutor, FBI agents assigned to the investigation and trial of this case, and David Kraft, a key prosecution witness who testified against petitioner at trial (T6902-3).

1. References are to the typewritten pages of the trial transcript, filed with the Court of Appeals and transmitted to the Clerk of this Court.

In these recorded conversations, Pullman several times asked the FBI agents whether he would be sentenced to imprisonment upon pleading guilty and testifying for the government at trial. On April 18, a FBI agent asserted that "off the record" he "can guarantee" to Pullman that "there's no way you're gonna get screwed or do time" but that if the government agents were ever asked whether they had made any promises to Pullman, they would have to deny it (D32-3).[2] The agents instructed Pullman himself that if he were asked on the witness stand if any promises were made to him, he should deny this (D116).

In further efforts to allay Pullman's fears about the sentence that he would receive, the agents assured him that the prosecutor, Michael Pollack, and the trial judge were "close", that Pollack controlled the judge and that when Pollack recommends that a defendant "receive no sentence," the judge "says, 'You're right, Michael'" (D34-5, 116-18).

Intertwined with these discussions between the FBI agents and Pullman were conversations between Pollack and Pullman calculated to impress Pullman that the judge was biased in favor of the prosecution and would follow prosecution recommendations. Thus, Pollack asserted that he and the judge were "close" and that the judge had sentenced another co-conspirator to a relatively harsh jail term because the government wanted that as an inducement for that person to

2. References denoted with the prefix "D" are to pages of the transcript made by the trial court of the Pullman recordings and marked as court exhibits during trial (9002-6). The transcripts are set forth in the appendix of petitioner on his appeal to the Court of Appeals.

testify as a prosecution witness at trial (D214-6). The following colloquy then ensued:

> "Pullman: [referring to the trial judge] What you say he does.
>
> Pollack: He'll agree.
>
> Pullman: He jumps to the whip a little?
>
> Pollack: I'd say forty out of forty times.
>
> Pullman: Yeah. In other words you control him — that judge.
>
> Pollack: In this degree, as far as witnesses go. Yes. Yes" (D216-7).

Ultimately, Pullman testified as a prosecution witness pursuant to a grant of testimonial immunity (6432). At that time he recanted prior grand jury testimony adverse to petitioner; the prosecution then was permitted to introduce, as substantive evidence, his grand jury testimony.

Additional disclosures on the Pullman recordings related to the testimony of David Kraft, a prosecution witness. On April 19, 1974, Kraft testified on direct examination that he gave substantial amounts of money to petitioner on petitioner's representations that he had fixed superfecta races, that this money would be bet on those races and that Kraft would share in the winnings. On cross-examination that day, Kraft conceded

that he had actually "lost money" on his betting on races that petitioner had supposedly fixed (4425, 4615, 4649-50). Then, under defense questioning on a point argued by the defense throughout the trial — that petitioner had not fixed races but had obtained betting money by conning people into thinking that he had fixed races — Kraft acknowledged that he might have been the victim of a tout scheme (4650).

Later that day, Pullman was present in the prosecutor's office during discussions between the prosecutor, FBI agents and Kraft to plan the rehabilitation of Kraft on re-direct examination scheduled for the next court day. During this session recorded by Pullman (D55-107), possible avenues of rehabilitation were discussed to combat the impact of the defense cross-examination suggesting that the case involved a tout scheme, not a bribery scheme. After some discussion Kraft himself proposed an answer to the tout scheme argument which was promptly rejected by the prosecutor (D70). At this point FBI agent Fanning suggested a come-back for Kraft as follows:

> "Fanning: Let me ask you, Mike [Pollack] . . . Do you think he [petitioner] was touting Richard Perry? and the Varios? Do you think the jury could buy that he was touting the Vario people? . . . Oh, come on, they don't know the Vario people? The people in the jury box . . . Vario's been in and out of the papers for two years . . . the Gold bug" (D70-1).

The "Gold bug" mentioned by agent Fanning referred to an incident, widely reported by the New York media at the time, in which an electronic surveillance device was placed in a trailer in

Brooklyn by the office of Kings County District Attorney Eugene Gold for the purpose of overhearing conversations of alleged organized crime persons during the course of which conversations of Paul Vario, father of co-defendant Peter Vario, were overheard.

In court, following this discussion, Kraft, testifying in a manner consistent with the suggestion by Fanning, stated on re-direct examination:

> "The second reason I didn't think I was in any tout scheme was that when Mr. Pullman told me about Mr. Perry, he also added that Mr. Gerry was betting with Mr. Perry, who is connected with a *fierce mob* in Brooklyn . . . and I felt that Mr. Gerry wouldn't want to play tout schemes with people like that" (4925-9; emphasis added).

Kraft acknowledged, on re-cross-examination that none of the FBI reports on their numerous prior interviews with him contained any mention of this "fierce mob" allegation (4937-8, 4954-60).

Based on these disclosures in the Pullman recordings, the defense argued that prosecutorial misconduct required the declaration of a mistrial and dismissal of the indictment. Although noting that it was "particularly concerned" about the prosecution conduct as disclosed by these recordings, the Court denied the motion (5283, 5920).[3]

3. The New York Times of September 12, 1974, reported that after the trial, the trial judge sent the tapes and tape transcripts to the Department of Justice as a result of which the prosecutor, Michael Pollack, was officially reprimanded by Attorney General William Saxbe.

2. In regard to the representations made by the prosecutorial team to Pullman concerning the prosecutor's influence over the trial judge in respect to sentencing, the Court below, in its opinion, acknowledged that they were "both deplorable and unprofessional" (Appendix A, *infra*, 23a). But the Court held that the prosecutor "did make it clear that no assurances could be given as to what the judge would ultimately do on sentencing" and that "[i]n any event there was no obligation on the part of the trial judge to declare a mistrial or dismiss the indictment" (Appendix A, *infra*, 24a). In regard to the FBI assertions to Pullman that it "can guarantee" no jail time for him but that if asked about this subject on the witness stand, he should deny that such assurance was given to him, there was no discussion of this in the opinion below.

As to the defense contention that the Pullman tapes strongly suggested an attempt to suborn perjury by Kraft, the Court below held that its reading of the tape transcripts did not support this assertion and that the FBI agent's statement to Kraft "appears to have been nothing more than an honest attempt to discover why Kraft didn't believe that there was a 'tout' scheme" (Appendix, *infra*, 22a).

REASONS FOR GRANTING THE WRIT

The misconduct here by the prosecutorial team — including the FBI agents as well as the prosecutor himself — warrants this Court's issuance of the writ of certiorari in the exercise of its supervisory power over the administration of justice in the federal courts. See *McNabb v. United States*, 318 U.S. 332 (1943).

Confronted with the prospective prosecution witness, Pullman, who was fearful about the sentence he would receive in his own case, the FBI in effect promised the witness that he would not go to jail. Then, having promised this, they advised the witness that when on the witness stand he should lie and deny that any such promise had been made to him. And, in an effort to overcome the witness' hesitancy about testifying, the prosecutor himself assured the witness that in respect to sentencing he controlled the judge.

That this witness, when ultimately called by the government to testify at trial, did not testify favorably for it, does not erase the misconduct of the prosecutorial team. The misconduct here was clear and indisputable. The opinion of the Court below, although acknowledging that the government conduct was "deplorable and unprofessional," (Appendix A, *infra*, 23a), submits, in mitigation of this behavior, that Pullman "was pressing" the prosecutor and FBI "further and further to elicit damaging statements," (Appendix A, *infra*, 23a). Surely, in assessing whether the government met the obligations imposed upon it in the administration of the criminal justice system, a claim on behalf of the government that it was entrapped into misconduct has no place. After all, Pullman's inquiries to the prosecutorial team, persistent though they may have been, are no different than those of many prosecution witnesses who await sentencing on their own cases upon completion of their testimony.

As to the witness Kraft, the prosecution misconduct here actually infected the trial. In a devastating cross-examination Kraft conceded — consistent with the defense theory in the case

— that he might have been the victim of a tout scheme. The prosecutorial team then suggested to Kraft, at a meeting to prepare him for re-direct examination, that he dispute the defense contention by asserting that a key person betting with petitioner on superfecta races was connected with organized crime and petitioner would not tout such people. The pliable Kraft embraced the suggestion and so testified at trial.

The prosecutorial behavior in respect to Pullman and Kraft was a perversion of its obligation to see that "justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935). But even more than gross prosecutorial misconduct is at stake here. The tape transcripts reveal bald assertions by the prosecutor and the FBI that the trial judge was under their control and part of the prosecutorial team. The point here is not that there was truth to these allegations — they were denied by the trial judge and there is no basis whatsoever for crediting them. But rather, the significance is that they stain the appearance of justice, so fundamental to preservation of confidence in the actual administration of justice. Prosecutorial assertions of control over the judiciary, if unchecked, undermine the entire system. Truly, the remedy for such perversive conduct by the "United States Attorney . . . The representative not of an ordinary party to a controversy, but of a sovereignty," *Berger v. United States*, *supra*, at 88, is dismissal of the case in which that conduct occurs.

This Court's supervisory power over the administration of justice should be exercised both to cleanse the court process of the prosecutorial misconduct that occurred in the present case and, as a prophylactic measure, to deter such abuse in the future.

In *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court, after years of frustrating experience with less drastic judicial remedies for police abuse of Fourth Amendment rights, reluctantly acted to deter such abuses by excluding from trial evidence obtained in violation of such rights. It is respectfully submitted that the only effective deterrent against such prosecutorial misconduct as occurred in the present case is a rule barring prosecution in such cases. Were the remedy for such abuse only a later reversal of conviction, that would be ineffective to deter prosecutorial misconduct in a close case, since, in the heat of a trial, the trial lawyer prosecuting a case might well be willing to take a chance on this sanction by the appellate court.[4]

Moreover, limiting the judicial remedy for prosecutorial misconduct to reversal of conviction would establish a lesser sanction against prosecutors — who are officers of the court — for their misconduct than the exclusionary rule fashioned by *Mapp* against the police for their misconduct. Surely, such a dual standard is detrimental both to effective law enforcement and the administration of justice.

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4. A reprimand, such as that received by the prosecutor here from the Department of Justice, is surely of minimal consequence in deterring prosecutorial misconduct.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Frederick P. Hafetz

GOLDMAN & HAFETZ
Attorneys for Petitioner

May 22, 1975

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 548, 692—September Term, 1974.

(Argued January 13, 1975 Decided March 28, 1975.)

Docket Nos. 74-2100, 74-2106

UNITED STATES OF AMERICA,

Appellee,

—v—

FORREST GERRY, JR. and RICHARD PERRY,

Appellants.

Before:

LUMBARD, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from judgments of conviction after jury trial in the Eastern District of New York, Orrin G. Judd, *Judge*, finding appellants guilty of influencing the outcome of harness races by bribery and of conspiracy to do so in violation of 18 U.S.C. § 224.

Affirmed.

TERRENCE M. BROWN, Attorney, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney, Eastern District of New York, and Peter M. Shannon,

Jr., Attorney, Department of Justice, Washington, D.C., on the brief), *for Appellee.*

FREDERICK P. HAFETZ, Esq., New York, N.Y. (Goldman & Hafetz, New York, N.Y., on the brief), *for Appellant Forrest Gerry, Jr.*

JULIA P. HEIT, Esq., New York, N.Y. (Jacob P. Lefkowitz, New York, N.Y., on the brief), *for Appellant Richard Perry.*

LUMBARD, *Circuit Judge:*

Following an eleven-week jury trial in the Eastern District of New York, the appellants Forrest Gerry and Richard Perry were on May 31, 1974 convicted of influencing the outcome of harness races by bribery (count 1) and of conspiring to do so (count 2) in violation of 18 U.S.C. § 224. The indictment which set forth the charges against Gerry and Perry named twenty-eight individuals as defend nts. Of these, two pled guilty;[1] five were severed;[2] the trial judge directed verdicts of acquittal as to five; and, the jury acquitted fourteen. Only the two appellants were convicted.

On July 19, 1974 the appellant Gerry was sentenced to concurrent terms of four years imprisonment on each of the two counts and was fined ten thousand dollars on each count. The appellant Perry was sentenced, also on July 19, 1974, to concurrent terms of two and one-half years

1 Seymour Rothstein see n.15 & p. 2596 *infra*, pled guilty prior to trial. Michael Sherman, see n.5 & p. 2588 *infra*, was a fugitive at the start of the trial and pled guilty after his arrest.

2 One of those severed, Joseph Pullman, see pp. 2602-2603 *infra*, received a grant of immunity and testified at trial. After the trial was concluded the indictments were dismissed on motion of the government as to the four other defendants who had been severed.

imprisonment on each of the two counts and was fined ten thousand dollars.

Perry was sentenced under 18 U.S.C. § 4208(a)(2) with eligibility for parole after six months imprisonment.

As is not surprising after a multi-defendant eleven-week trial, the appellants raise many claims of error. These alleged errors relate generally to (1) the sufficiency of the evidence; (2) the correctness of various evidentiary rulings made by the trial judge; (3) the use, consequences, and implications of tapes surreptitiously recorded at the prosecutor's office; and (4) the propriety of both the prosecutor's summation and the court's charge. We find that none of these claims are substantial and we therefore affirm.

I. *The Evidence*

The record, viewed in the light most favorable to the government, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), reveals a scheme master-minded by Gerry and implemented by Perry and others which operated from January through April 1973 and which had as its purpose the illegal fixing of a specific type of harness race, the "superfecta." A "superfecta" race is a harness race in which there are generally eight horses competing. Its uniqueness does not lie in the way the race is run but in the way that the wagering is conducted on the race. There are basically three types of "superfecta" bets: a three dollar bet; an eighteen dollar bet; and, a seventy-two dollar bet. To win a three dollar bet the bettor must select the first four horses in the exact order in which they cross the finish line. In the eighteen dollar bet, also known as a "key box," the bettor selects four horses and designates one of the four to finish in first place. The bettor does not, however, have to select the exact finishing order of the other three horses he selects. In the seventy-two dollar

bet, also known as a "box bet," the bettor must choose merely the first four horses; he does not have to select any order in which they finish.

A vice president of the Off Track Betting Corporation, Michael Shagan, testified as to the statistical probabilities of winning a "superfecta" bet. He explained that in an eight horse race there were 1,680 possible combinations of four horses finishing in an exact order in the first four positions. Therefore, the odds against winning on a three dollar bet were 1,680 to 1. If, however, a bettor could eliminate one or two horses from his consideration the odds would change dramatically. As Shagan testified, if a bettor were only to consider six horses rather than eight then on a three dollar bet the odds would be reduced from 1,680 to 1 to 360 to 1.

Viewed in another perspective, it would cost $5,040 to place three dollar bets on all possible combinations of four horses in an eight horse race. It would cost half of that amount or $2,520 to place three dollar bets on all possible combinations of four horses in a seven horse race and just $1,080 if only six horses are considered. Since in 1973 the average return for a winning "superfecta" ticket was $3,000, a bettor who could definitely eliminate one or two horses from consideration could afford to bet on all the possible combinations remaining and have a near mathematical certainty of winning more money than he spent on purchasing the wagering tickets.

The attempt to eliminate one or more horses from consideration in the "superfecta" betting formed the basis of the conspiracy exposed at the trial. Bribery of harness race drivers was the means by which the conspiracy was implemented.

The evidence showed that the appellant Gerry offered bribes to certain race drivers to finish in specified positions, usually in the last four places or "out of the money"

in a particular "superfecta" race. Allen Cantor, a harness race driver who was named as a co-conspirator and who testified at trial under a grant of immunity, stated that on January 24, 1973 he had a discussion with the appellant Gerry near Roosevelt Raceway about the "superfecta" race to be run that evening in which he, Cantor, was scheduled to drive one of the horses. Cantor testified that Gerry asked him to "finish out of the super" and told him that if he did so Gerry would give him either a thousand dollars or a ticket on the winning combination. Cantor admitted having told Gerry he would prefer the thousand dollars and he also admitted that he had received $800 from Gerry on the next day, his horse having finished seventh in the "superfecta" race. Another harness race driver, Randolph Perry,[3] also testified to a conversation with Gerry which, though more equivocal than the Gerry-Cantor conversation related above, the jury could reasonably have inferred was an attempt by Gerry to bribe Randolph Perry to finish out of the first four positions.

Having offered bribes to one or more drivers to insure that their horses would be in specified positions, Gerry would then bet large sums of money covering all possible combinations in which those horses were in the appropriate positions. Though Gerry bought a large number of "superfecta" tickets himself, most of the actual placing of the bets was done by Gerry relaying the preferred combinations to other gamblers. One of the other gamblers to whom Gerry relayed the combinations was the appellant Perry.

Perry's relationship with Gerry and his role in the conspiracy was explained by Bruce Cussell, a former employee of Perry's who testified in behalf of the govern-

3 The record fails to show any familial relationship between this witness and the appellant Richard Perry.

ment.[4] Cussell, who was twenty-eight years old at the time of trial, had attended elementary school with Perry and had known Perry "off and on" his whole life. Beginning in February or March 1973 Perry paid Cussell two hundred dollars per week to perform certain services for him. As a daily routine Cussell would bring the New York Times, breakfast and a trotting sheet for the evening's races to Perry's house in Brooklyn where the two of them would wait a call from Gerry. At approximately 11:00 a.m. or noon Gerry would call and during the call Perry, using the trotting sheet Cussell had brought, would make a circle next to the dead horses, *i.e.*, the ones that were not to finish in the first four positions, and make an "x" next to those that should be "keyed." Cussell testified that Perry had told him that he had fixed races with Gerry and that Gerry would contact the drivers and give them either one thousand dollars or a winning ticket.

Following his daily call from Gerry, Perry would, according to Cussell's testimony, call Michael Sherman[5] and Peter Vario[6] and relay to them the combinations he had received from Gerry. Perry would then give Cussell between $9,000 and $15,000 which was to be used to purchase tickets on the designated combinations. After purchasing the tickets at an Off Track Betting Office,[7] Cussell would hand the tickets over to Perry and then accompany him to the race track.

When the "superfecta" race had been run Perry would generally pass the winning tickets on to others to cash

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4 Cussell's competency as a witness is discussed at pp. 2589-2590 *infra*.

5 See n.1 *supra* & p. 2584 *infra*.

6 A co-defendant who was acquitted by the jury.

7 During the time period covered in this indictment the Off Track Betting Corporation did conduct "superfecta" betting. It has, however, discontinued this type of betting.

since persons cashing winning "superfecta" tickets over $900 are required to complete and verify an Internal Revenue Service form.[8] Occasionally, Gerry and Perry would cash tickets themselves. During the three and one-half months of the conspiracy, January through April of 1973, Gerry was responsible for having placed over one million dollars in bets which resulted in gross winnings of approximately two and one-quarter million dollars.

The defense attempted to establish that a good handicapper could do very well in "superfecta" betting and they called George Levy, President of Roosevelt Raceway, who testified that prior to any indication of wrongdoing he had suggested that the "superfecta" be terminated because he was afraid of what a good handicapper with ample funds could do. The defense also called racing experts who had either been present at or had viewed films of the races that had allegedly been "fixed." These experts testified that they had observed no wrongdoing on the part of the defendant drivers. None of the defendants testified.

II. *Sufficiency of the Evidence*

The recital of the evidence disposes of Gerry's first claim of error, that the evidence was insufficient. Moreover, Gerry's brief concedes that "viewed in the light most favorable to the government, the evidence against Gerry is sufficient."[9]

Perry claims that the government failed to produce sufficient evidence to establish that he knowingly participated in any bribery scheme and that, excepting the testimony of

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8 The form required to be filed is Internal Revenue Service form 1099. Those cashing winning tickets on a commission basis are often referred to as "ten percenters."

9 Brief for Appellant Gerry at 21.

Bruce Cussell, all that was shown was that he had participated in a handicapping scheme with Gerry. Perry argues that we should not consider the testimony of Bruce Cussell as he was an incompetent witness. We disagree.

III. *Competency of Witness Cussell*

Perry argues that the failure to hold a hearing to determine whether Cussell was a competent witness requires reversal. He does not contend that the fact that Cussell had been a patient at a mental hospital rendered him incompetent to testify as a matter of law. *United States* v. *McFarland*, 371 F.2d 701, 705 (2d Cir. 1966) *cert. denied*, 387 U.S. 906 (1967); 2 J. Wigmore, *Evidence* § 497 (3d ed. 1940). He does, however, argue that the trial court erred in not holding a hearing to explore the competency issue.

On April 8, 1974, during the trial but prior to Cussell's being called as a witness, a defense attorney asked the Court to conduct a hearing on Cussell's competency to testify. The prosecutor replied that he had received a letter that morning indicating that Cussell was not suffering from any impairment of memory or ability.[10] Later the same day Perry's attorney asked Judge Judd when he should arrange to have a defense psychiatrist present in court for the voir dire examination on Cussell's competency. Judge Judd instructed him to have the psychiatrist present at 2:00 p.m. the following day, April 9, 1974. On the morning of the ninth the government supplied the defense attorneys with a copy of the letter, referred to the preceding day, from Dr. Parlade dated April 5, 1974 which indicated that Cussell's mental condition would not in any way effect his testimony. The defense psychiatrist was

10 At this point in the trial it was not clear from whom the government received the letter. It later became evident that the prosecutor was referring to a letter from Dr. Parlade dated April 5, 1974.

apparently never produced that afternoon or anytime thereafter and Cussell took the stand on April 15, 1974 without any objection.

Cussell's mental competency and his psychiatric history were fully explored both on direct and cross-examination. He was under psychiatric care and on medication at the time of trial and had a history of mental illness. During cross-examination another request was made to disqualify Cussell on the grounds of mental incompetency. Although the trial judge had not explicitly ruled that Cussell was competent to testify, he had permitted Cussell to take the stand after reviewing the correspondence from Dr. Parlade.[11] Further, when the competency argument was raised on cross-examination, Judge Judd stated that Cussell's answers had been comprehensible and intelligent and that his testimony had been corroborated on many points by the testimony of government agents. From all this we think it readily apparent that, notwithstanding the lack of an express finding, Judge Judd made it clear to all parties that he found Cussell competent to testify.

The competency of a witness to testify before a jury is a threshold question of law which lies exclusively in the trial court's discretion. *United States* v. *Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1972). When competency is questioned there is no legal requirement that the trial judge conduct a formal hearing. There must be such an inquiry as will satisfy the Court that the witness is competent to testify but the form of that inquiry rests in the discretion of the trial court. *Henderson* v. *United States*, 218 F.2d 14, 17-18 (6th Cir.), *cert. denied*, 349 U.S. 920 (1955). The trial judge's determination on the question of competency

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11 In addition to the April 5, 1974 letter, Dr. Parlade sent another letter dated April 8, 1974 in which he reaffirmed his opinion that Cussell had no memory impairment and that his mental condition would not affect his testimony.

will not be disturbed unless it was "clearly erroneous." *United States* v. *Crosby*, 462 F.2d 1201, 1202 (D.C. Cir. 1972); *United States* v. *Hardin*, 443 F.2d 735, 737 (D.C. Cir. 1970).

Having decided to permit Cussell to testify, Judge Judd repeatedly stated both throughout the trial and in his charge that Cussell's credibility was a question for the jury. Once a threshold finding of competency to testify is made by the court, it becomes the function of the jury to determine credibility. *United States* v. *Benn, supra*, 476 F.2d at 1130. Judge Judd's finding of Cussell's competency as a witness was not clearly erroneous and he properly instructed the jury regarding the determination on Cussell's credibility.

IV. *Alleged Prejudicial References*

Both appellants argue that the trial court erred in not excluding testimony that alluded to a "fierce mob," a "made man," and a "bookmaker." They contend that the introduction of this testimony was a deliberate attempt by the government to associate them, in the minds of the jurors, with the Mafia and thereby deprive them of a fair trial. We find that when these isolated references are viewed in the context of the testimony during which they were elicited and when weighed in the perspective of an eleven-week trial which produced over ten thousand pages of transcript, the appellants were neither unduly prejudiced nor denied a fair trial.

The reference to a "fierce mob" was made by David Kraft who, on direct examination, testified that from February through April of 1973 he received phone calls from Gerry telling him which horses to bet on in the "superfecta." Kraft relied on Gerry's information because Gerry told him that he could "reach" the drivers. On cross-examination Kraft admitted that he had lost money by

betting on Gerry's information and that he felt that he was a "victim of something." Asked if he thought that he was the victim of a "tout" scheme,[12] Kraft replied that he did not believe so. In an attempt to clarify this testimony and to rehabilitate its witness the government, on re-direct examination, sought to bring out the reasons underlying Kraft's belief that it was not a "tout" scheme: first, that too many horses were finishing exactly where they were supposed to; and, second, that according to Joseph Pullman, Gerry was giving the combinations to a guy by the name of Richie in Brooklyn who was connected with the mob and "you just don't tout those kind of people." The government asked for a ruling on the admissibility of this testimony and Judge Judd at first refused to allow testimony about the second reason which related to mob involvement.

When, however, on re-cross examination, Perry's attorney attempted to show that Kraft's testimony about Perry was of recent fabrication, Judge Judd reversed himself and decided that with a limiting instruction the second reason for Kraft's disbelieving that it was a "tout" scheme (*i.e.*, that the mob was involved and no one touts them) was admissible. Both immediately before and after the admission of this testimony the jury was instructed to consider it only to the extent that it related to the state of mind of the witness Kraft and that it was "not to be taken as evidence that anyone belongs to any mob."

The reference to a "made man" occurred during the testimony of Joseph Pullman, an indicted co-conspirator

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12 The charge to the jury described the questioned "tout" scheme as follows:

> "The implication in the cross-examination of Mr. Kraft was that Mr. Gerry was a con artist, who induced his betting clients to pay him money that he represented to be bribes but that he never actually bribed anybody and just put the money in his own pocket."

who testified under a grant of immunity. At trial Pullman denied that his grand jury testimony was truthful.[13] The government attempted to refresh his recollection with statements he had allegedly made to agents of the FBI. One of these FBI reports referred to a "Richie" as "the son of a made man in Brooklyn." When asked if he had made such a statement to the FBI, Pullman denied that he had ever in his life called anyone a "made man." Pullman testified that he "wouldn't use those words because made man doesn't mean nothing to me. It could be a businessman that was made, financially." Although Pullman denied knowing the meaning of the term 'made man" the appellants argue that the term is well-known and connotes membership in the Mafia.

The third and final alleged "mob" reference to which appellants object, *i.e.*, that Perry was a "bookmaker," occurred during the testimony of Marvin Proman. A groom and trainer, Proman had testified in the grand jury about the bribery of harness race drivers. At trial Proman, like Pullman, denied that he had told the truth to the grand jury.[14] The government attempted to impeach Proman's credibility with prior statements he had allegedly made to the FBI. One of those prior statements, which Proman did not recall at trial, was that Perry was a "bookmaker" from Brooklyn. At the time of this line of questioning, the jury was instructed that the questions were allowed solely to impeach Proman's credibility and that the mere

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13 The admissibility of Pullman's grand jury testimony is discussed at p. 2600 *infra*.

14 After the government had closed but before the defense began, Proman, who had been missing, was located in California and brought back to New York to testify. Judge Judd permitted the government to reopen its case so that Proman could be called. The admissibility of his grand jury testimony is discussed at pp. 2601-2602 *infra*.

asking of the questions did not justify a finding that the statements made in the questions were true.

Appellants contend that admission of these references to "fierce mob," "made man" and "bookmaker" violated their due process rights by permitting guilt to be established merely by an alleged association with criminal companions, in particular, the Mafia. *United States* v. *Vaught*, 485 F.2d 320, 323 (4th Cir. 1973); *United States* v. *Tomaiola*, 249 F.2d 683 (2d Cir. 1957). Exclusion of the reference to a "bookmaker" by the trial court would have impermissibly limited the government's right to refresh the recollection of an obviously recalcitrant and recanting witness. Further, it is difficult to see how the use of the term "bookmaker," which does not have any inherent organized crime connotation, could have been unduly prejudicial or shocking in a trial involving allegations of fixing horse races. Finally, the limiting instruction given by the trial court was clear and correct. Even assuming that the jury, unlike this panel, understood the meaning of "made man" that phrase was an integral part of the government's attempt to refresh the recollection of yet another recalcitrant and recanting witness.

The reference to a "fierce mob" poses a greater potential for prejudice than either "bookmaker" or "made man." However, in light of the attempt on cross-examination to show that Kraft was being victimized by a "tout" scheme, the elicitation of the two reasons why Kraft did not believe it was a "tout" scheme appears to have been a reasonable and permissible response by the government. Again, the trial court immediately gave the proper limiting instruction that the testimony was to be considered only as it related to Kraft's state of mind, not as evidence that any of the defendants was a member of any mob. Thus each of the three contested references was properly admitted. We fail to see how any one of them standing

alone or all three taken together deprived the appellants of a fair trial. See generally *United States* v. *Polizzi*, 500 F.2d 856, 888 n.54 (9th Cir. 1974); *United States* v. *De Masi*, 445 F.2d 251 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971); *Carbo* v. *United States*, 314 F.2d 718, 739-40 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

V. *Testimony Regarding State of Fear*

Another evidentiary ruling challenged by the appellants involved the admission of testimony elicited to impeach a recanting witness' denial of fear. Having pled guilty to one count of the indictment in this case, Seymour Rothstein testified as a government witness on April 23, 1974 and gave testimony damaging to Gerry and other defendants. No defense attorney cross-examined Rothstein. On May 10, 1974 he received a suspended sentence on his guilty plea.[15] Five days later, on May 15, 1974, Rothstein was called as a defense witness. He then stated that much of his earlier trial testimony was false and that he had lied for the government when threatened that otherwise the prosecutor would use his influence to insure that he receive a five-year jail sentence. Rothstein claimed that he had told both the prosecutors and the FBI that he did not know Perry but that he had been forced to testify that he did know him.

The government's response to these allegations was an attempt to show that the recantation was motivated by Rothstein's fear for his own life. On cross-examination by the government Rothstein was asked if he had ever expressed fear for his own "personal safety to anybody during the course of this proceeding." He insisted that he

15 Judge Judd sentenced Rothstein to a term of imprisonment of one year and one day but suspended execution of the sentence and placed Rothstein on probation for three years.

had not. To impeach this denial, Frederick Eder, Rothstein's probation officer, was permitted to testify that in January 1974, two months prior to trial, Rothstein had expressed to him fear for his personal safety. Further, the government was permitted to introduce a memorandum, which had been shown to the witness prior to trial, from Michael Pollack, the chief prosecutor in this case, to the Department of Justice. The memorandum, which was dated February 3, 1974, requested the termination of subsistence payments to Rothstein because he had left the area to which he had been relocated "and returned home, and [could] no longer be considered secure." Both the Eder testimony and the subsistence memorandum were admitted because they impeached Rothstein's denial of fear for his safety.[16]

Appellants argue that the admission of this "fear" testimony resolved the trial into a swearing contest in violation of *United States* v. *Cunningham*, 446 F.2d 194, 197 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971). In *Cunningham* a government witness did not give the testimony injurious to the government's case but he failed to remember certain events and conversations about which the government had expected him to testify. We held that under those circumstances it was improper to call a government agent to testify to conversations he had with the non-remembering witness since "[t]he maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised," and "where the witness gives no testimony injurious to the party calling him, but only fails to render

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16 Appellants contend that evidence of fear was irrelevant since any fear that may have existed could have been related to a prior loansharking case, a case which this jury was aware of. The existence of another possible cause of fear did not render the fear testimony inadmissible but merely affected its weight.

the assistance which was expected by professing to be without knowledge on the subject, there is no reason or basis for impeachment. . . ." *Kuhn* v. *United States*, 24 F.2d 910, 913 (9th Cir.), *modified on other grounds on rehearing*, 26 F.2d 463, *cert. denied sub nom. Lee* v. *United States*, 278 U.S. 605 (1928), cited with approval in both *United States* v. *Cunningham*, 446 F.2d 194, 197 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971) and *Taylor* v. *Baltimore & Ohio R.R.*, 344 F.2d 281, 284 (2d Cir.), *cert. denied*, 382 U.S. 831 (1965).

The witness Rothstein went far beyond asserting a failure of memory and directly accused the government of forcing him to commit perjury. Under these circumstances, "the Government could not be expected to remain silent in the face of a claim, vigorously developed by defense counsel . . . that it had procured false testimony by threats . . . ." *United States* v. *Rivera*, (No. 74-2115) (2d Cir. March 13, 1975) (slip op. 2263, at 2277). Further, "[i]t was competent for the Government not simply to deny that threats on its part had led to [Rothstein's direct] testimony but also to assert that it was his recantation rather than his [direct] testimony which was due to fear resulting from threats by unnamed third parties." *Id.* at 2278.

In addition to their *Cunningham* argument, the appellants contend that the testimony of Eder and the subsistence memorandum were improperly admitted because there was no evidence connecting any defendant to any threat to Rothstein's safety. No such connection need be shown.[17]

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17 The defendants may have been entitled to a limiting instruction that there was nothing in any of the evidence adduced to show that any of the defendants were responsible for any threats. No request for such an instruction was made either during Eder's testimony or at the time the subsistence memorandum was introduced. *United States* v. *Rivera*, *supra*, at 2278-79.

Rivera, *supra*, at 2278; *United States* v. *Franzese*, 392 F.2d 954, 961 (2d Cir. 1968), *vac. & rem'd on other grounds*, 394 U.S. 310 (1969).

VI. Prior Similar Acts

Yet another evidentiary ruling which the appellants claim requires reversal was the admission of prior similar acts, specifically testimony that in 1965 two of the driver co-defendants had fixed races. The rule in this Circuit as to prior criminal activity is in the inclusionary form and holds that evidence of other crimes is admissible except when offered solely to prove criminal character. *United States* v. *Keilly*, 445 F.2d 1285, 1288 (2d Cir.), *cert. denied*, 406 U.S. 962 (1971); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). In light of the defense contention that one or two drivers could not fix a race, the testimony that in the past one or two drivers had successfully fixed races was certainly probative. Therefore, when the testimony of these prior similar acts was offered not solely to show criminal character but to show that a race could be fixed by one or two drivers it was admissible with a proper limiting instruction. Such an instruction was given in this case.

Gerry relies on *United States* v. *Deaton*, *supra*, to argue that it was error to admit testimony that in 1966 his license as a harness race driver was suspended for one week by the New York State Harness Racing Commission for lack of financial responsibility. As discussed above, *Deaton* would mandate exclusion of this testimony only if it were offered solely to show bad or criminal character. The trial court admitted the license suspension testimony because it found that Gerry's financial responsibility had been put in issue by the defense contention that Gerry was "one of the greatest handicappers in the

world." While financial responsibility and handicapping skill are not necessarily interrelated, it can not be said that the suspension evidence was admitted solely to denigrate Gerry's character.

VII. *Prior Grand Jury Testimony of Witnesses*

A further evidentiary ruling to which Gerry takes exception permitted the introduction of the prior grand jury testimony of Marvin Proman and Joseph Pullman, both of whom testified at trial and both of whom recanted. Gerry concedes that the prior grand jury testimony of Proman and Pullman would be admissible under our holding in *United States* v. *DeSisto*, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964), which indeed we adopted with the situation of recantation of grand jury testimony in particular view. He contends, however, that the prior grand jury testimony would not be admissible under Rule 801(d)(1) of the new Federal Rules of Evidence. This argument rests on a serious misreading of the new Rules which were signed by the President on January 2, 1975 and which become effective on the one hundred and eightieth day after enactment. Rule 801(d)(1) not only adopts but somewhat expands the *DeSisto* rule. The prior grand jury testimony was clearly admissible. See *United States* v. *Rivera*, *supra*, at 2274-75.

Gerry also objects to the admission of Proman's grand jury testimony on the ground that it contained impermissible hearsay statements made by Michael Sherman to Proman. In the grand jury Proman had testified that Sherman gave him money to bribe harness race-drivers to finish "out of the money" and that Sherman had told him that the money came from Gerry. It is Gerry's position that for the Sherman statements to be admissible under the law in this Circuit it must first be shown by a

fair preponderance of the non-hearsay evidence that Sherman participated in the conspiracy. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Assuming solely for purposes of this argument that Gerry's contention is not an unwarranted extension of *Geaney*, we find that there was sufficient non-hearsay evidence to establish by a fair preponderance Sherman's participation in the conspiracy. There was non-hearsay testimony of Sherman's acts which is found in Proman's grand jury testimony; Cussell's testimony as to Perry's daily calls to Sherman; Lipkin's testimony that he saw Perry in Sherman's motel room; and the record of phone calls from Sherman's motel room to phones listed to Proman and Perry. There was no error in admitting Proman's grand jury testimony as to Sherman's declarations.

VIII. *Other Evidentiary Rulings*

Perry alleges that he was impermissibly prejudiced by a ruling of the trial court which allowed FBI Agent Sean Hilly to testify to a post-conspiracy admission Hilly overheard Gerry make to Kraft. Perry claims that in a joint trial the introduction of Gerry's admission violated his sixth amendment right to confrontation. *Bruton* v. *United States*, 391 U.S. 123 (1968). We find this contention to be without merit since the admission contained no reference to any other defendant and since the jury was properly instructed that the testimony was received only against Gerry. See *United States* v. *Trudo*, 449 F.2d 649, 651-53 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

Gerry and Perry assign as error the introduction of the testimony of the mathematician, Dr. Yaspan, and the numerous charts and graphs used to establish betting patterns. They claim that this evidence was not probative on

the question of bribery as it permitted the jury to convict them on the basis of probabilities, possibilities and mathematical speculation. See Tribe, *Trial by Mathematics,* 84 Harv. L. Rev. 1329 (1971). While there may have been an overkill in the mathematical, statistical, and graphic evidence introduced in this case, certainly sufficient evidence of actual bribery was adduced to refute the contention that the jury verdict was based on mathematical probabilities and not on actual evidence of bribery. In any event, this testimony was introduced for purposes of meeting defendants' argument that Gerry's apparent success was attributable to his handicapping skills and the judge gave appropriate cautionary instructions to remind the jury that Gerry's skills as a handicapper reflected his special knowledge of the field and not simply a mechanical application of a rule excluding horses bearing the longest odds.

IX. *Prosecutor's Conversations with Witness; The Pullman Tapes*

In addition to their claims of error relating to the sufficiency of the evidence and the various evidentiary rulings discussed above, appellants claim that the trial judge's handling of the problems arising out of a surreptitious taping of conversations held at the prosecutor's office was so prejudicial as to require reversal. Joseph Pullman, an indicted co-conspirator whose case had been severed prior to trial, had given testimony in the grand jury that was most damaging to Gerry and other defendants. After his grand jury testimony but prior to his being called at trial, Pullman, on April 16, 1974, met with Gerry's attorney and agreed surreptitiously to tape his interview sessions at the prosecutor's office. During the trial, on April 18, 19 and 21, 1974, Pullman went to the office of the Brooklyn Strike Force with a hidden taping device. While Pullman was

allegedly present at the Strike Force office to prepare for his forthcoming testimony, the tapes reveal that his real purpose in being there was deliberately to draw the prosecutors and government agents into making damaging statements. The fact that Pullman had taped his interview sessions was not immediately revealed, apparently because Pullman hoped to receive a grant of immunity before his taping activities were made known to the government. When Pullman was finally called at trial he denied the truth of his grand jury testimony and claimed that he had been coached in the grand jury by the prosecutor.

The tapes recorded by Pullman contain some unfortunate statements made by both the prosecutors and government agents. When, however, the defense arguments relating to the Pullman tapes are shorn of their rhetoric they resolve into the following contentions: (1) that the government suborned perjury on the part of the witness Kraft and then lied to the court about this alleged subornation; (2) that the court below erred in not ordering Kraft recalled as part of the government case; (3) that the court below erred in requiring the preparation of a transcript of the tapes as a prerequisite to their being played; (4) that statements on the tapes called into question the integrity of the trial judge and he should have declared a mistrial; and, (5) that the court's statements concerning the legality of the taping prejudiced Gerry.

On Friday, April 19, 1974, a day on which Pullman wore a recording device in the prosecutor's office, David Kraft had been cross-examined by the defense attorneys and was expected to resume his testimony on the following Monday. As discussed above in relation to his testimony concerning a "fierce mob," Kraft had been asked whether he believed that he was the victim of a "tout" scheme. That evening at the Strike Force office Kraft discussed his testimony

with government agents. At one point in this discussion FBI Agent Fanning asked: "All right, do you think he was touting Richard Perry? and the Vario's? Do you think he was touting the Vario People." Based on this question the appellants argue that the government was suborning Kraft to commit perjury. We find that a reading of the transcripts fails to support this charge. Indeed, the question asked by Fanning, when viewed in the context of the entire conversation, appears to have been nothing more than an honest attempt to discover why Kraft didn't believe that there was a "tout" scheme.

We also find no merit in the allegation that the prosecutor, Michael Pollack, deliberately lied to the court as to the date on which he discussed with Kraft possible avenues of rehabilitation. Pollack admitted that he had spoken to Kraft on Friday, April 19, 1974, but that the meeting was chaotic and he did not receive a satisfactory response until Monday, April 22, 1974. Pollack volunteered that "for me, Friday through Monday is one day." While the tapes show a more extended Friday conversation between Pollack and Kraft than Pollack's statements may have led one to expect, Pollack was correct in stating that there were many other people milling about and that the meeting was rather chaotic. Further, there is no reason for Pollack to have misled the court as to whether he spoke to Kraft on Friday or Monday as it was clearly a collateral issue of no significance.

The appellants' second argument arising out of the Pullman tapes is that after the existence of the tapes was made known the court erred in not ordering Kraft recalled as part of the government case so that he could be subjected to further examination based on the tapes. The decision as to when a witness is to be recalled rests in the sound discretion of the trial court. *United States ex. rel.*

Nelson v. *Follette*, 430 F.2d 1055, 1059 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971). While it might have been wiser to permit Kraft to be recalled, we find no abuse of that discretion in this matter. The defense attorneys obtained possession of the Pullman tapes while Kraft was still testifying as a government witness. Their decision not immediately to divulge the existence of the tapes and then use them in examining Kraft was a tactical decision. In any event, as the court pointed out, defendants had the opportunity to call Kraft during the presentation of their cases.

The appellants also argue that the trial judge could not condition the playing of the tapes on the preparation of an accurate transcript. This was a decision which rested in the sound discretion of the trial court and, again, we can not say that there was an abuse of that discretion. The judge's insistence on the preparation of a transcript, based in part on his difficulty in understanding the tapes, was both clearly and consistently made known to the defense counsel. The judge himself provided counsel with a rough transcript of all the tapes. Thus he did more than he was required to do. See *United States* v. *Frazier*, 479 F.2d 983 (2d Cir. 1973).

It is contended by Gerry and Perry that statements contained on the tapes called into question the integrity of the trial judge and he was obligated *sua sponte* to declare a mistrial. Statements made by both the prosecutor and government agents relating to the prosecutor's influence over the trial judge in the matter of sentencing were both deplorable and unprofessional. It was indeed indiscreet for the prosecutor to inform Pullman that the trial judge had supported him in obtaining admission to the bar. However, a full reading of the transcripts shows that Pullman was pressing further and further to elicit damaging state-

ments and that although the prosecutor claimed to have some influence with the judge, he did make it clear that no assurances could be given as to what the judge would ultimately do on sentencing. In any event there was no obligation on the part of the trial judge to declare a mistrial or dismiss the indictment.

The appellants' last contention arising out of the Pullman tapes is that the trial court's statements concerning the legality of the making of the tapes unduly prejudiced Gerry. After the existence of the tapes was made known to the jury, the defense requested an instruction that there was "nothing illegal or wrong or criminal" in Pullman's making the tapes. The judge did not give the requested instruction and stated in the presence of the jury: "I'm not sure about that." He added: "Well, by saying I am not sure, doesn't mean it's wrong. It means I am not sure it is right." The next morning the judge formally instructed the jury that there was no law that prevented the making of the tapes and that the propriety of their having been made had no relationship to the guilt or innocence of any of the defendants. There was no prejudice to the defendant Gerry in these instructions.

X. *Prosecutor's Summation*

Appellants' final claim of error relates to the propriety of both the prosecutor's summation and the court's charge. In particular, Gerry objects to the prosecutor's discussion of Proman's disappearance prior to trial and the speculation that he was being supported by Gerry during this period. We find that these comments did not transgress the "broad limits" within which "counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence." *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968).

XI. *Charge of the Court*

The charge delivered to the jury was a fair and full statement of the law and gave proper guidance to the jury. The judge would have been better advised to omit certain statements, particularly a comment on his interest in why Pullman insisted on receiving a grant of immunity rather than pleading guilty and "tak[ing] his chances on the sentence I might impose." While this and other statements in the charge were unnecessary and unfortunate, we do not believe that they resulted in any prejudice to the appellants. Cf. *United States* v. *Pinto*, 503 F.2d 718, 724 (2d Cir. 1974).

We have considered the other claims of the appellants and find them to be without merit.

The judgments of conviction are affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1480

FORREST GERRY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-1531

RICHARD PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a)[1] is reported at 515 F.2d 130.

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[1] All "Pet. App." references are to the appendix in No. 74-1531.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1975. Petitioner Gerry filed a petition for a writ of certiorari on May 27, 1975, within the period of an extension of time granted by Mr. Justice Marshall on April 11, 1975. Petitioner Perry's petition for rehearing was denied on May 7, 1975; he filed his petition for certiorari on June 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain conduct of the government warrants reversal of petitioners' convictions.
2. Whether the trial court erred in failing to hold a formal hearing on the mental competency of a witness (Pet. No. 74-1531).
3. Whether the trial court erred in admitting testimony of a mathematician on the issue of betting patterns (*ibid.*).
4. Whether the reference to "made man," "bookmaker," and "fierce mob" denied petitioner Perry a fair trial (*ibid.*).

STATUTE INVOLVED

18 U.S.C. 224 reads in pertinent part:

> Bribery in sporting contests.
>
> (a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in com-

merce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

STATEMENT

Following an eleven-week jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of influencing the outcome of harness races by bribery (count 1) and of conspiring to do so (count 2), in violation of 18 U.S.C. 224 and 371.[2] Petitioner Gerry was sentenced to concurrent terms of four years' imprisonment. Petitioner Perry was sentenced to concurrent terms of two and one-half years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2). Both petitioners were also fined $10,000 on each count.

1. The government's evidence is detailed in the court of appeals' opinion (Pet. App. 3a-7a). In brief, it showed that from January until April of 1973, Gerry, Perry, and others conspired to bribe New York harness race drivers to finish in specified positions, usually out of the money, in "superfecta"

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[2] The grand jury indicted 28 individuals. One was a fugitive at the time of trial (Michael Sherman); when subsequently arrested he pled guilty. Five others were severed prior to trial, one of whom (Seymour Rothstein) pled guilty during the trial. Six were dismissed during the trial, and fourteen were acquitted.

races.[3] After bribing certain drivers to hold their horses back, Gerry would bet large sums of money covering all possible combinations in which the remaining horses might finish (T. 136-142, 1089, 1186-1197, 1780-1781, 1924-1925, 2223-2235, 2520).[4] To place the bets, Gerry would relay the combinations to other gamblers, including petitioner Perry and co-defendant David Kraft,[5] who would place the bets themselves or through others (T. 1835, 1844, 2116, 2198-2199, 2238-2239, 3573-3574, 3588-3589, 3949, 4217-4219). Gerry also bought large numbers of superfecta tickets himself (T. 1924-1925, 1955, 2198-2199, 2223, 2370-2371). The gamblers would normally have others cash the winning tickets and sign the necessary Internal Revenue Service reporting forms provided by the racetrack (*e.g.*, T. 395-503, 3349-3350, 3477-3478). Gerry also got a portion of the winnings made by other gamblers (T. 4235, 4255). In the approximately three and one-half months of the conspiracy, Gerry was responsible for

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[3] A "superfecta" is a harness race in which the bettor, in order to win, must select the first four horses to finish, usually out of a field of eight (Pet. App. 3a-4a).

[4] As the court of appeals explained, with one or more horses out of contention for the first four positions, the number of possible combinations in which the remaining horses might finish was small enough that petitioners could bet on each combination and, given the amount paid by a winning ticket, assure themselves a sizable profit on every fixed race.

[5] Kraft pled guilty to sports bribery and testified as a government witness (T. 4278).

over $1,000,00 in bets, with gross winnings of over $2,000,000 (T. 1311, 1679).

FBI Agent Sean Hilly testified that he overheard a conversation between Gerry and Kraft in which Gerry said that he was paying off the drivers and had taken the precaution of not being seen with more than one driver at any one time (T. 1754-1757, 1780-1781). Kraft testified to similar admissions by Gerry (T. 4237, 4258-4259, 4315-4316, 4341-4342).

2. The theory of the defendants' case, both in their cross-examination and in their case-in-chief, was that their enormous profits were attributable not to bribery, but to Gerry's remarkable talents at handicapping (*e.g.*, T. 4056, 4650, 4988, 8042-8043, 8444-8447, 8453-8455). The defense attempted to show that just one or two drivers could not fix a race (*e.g.*, T. 233, 8755), and that, even if they could physically manage to do so, they would be detected by the racing industry's safeguards (*e.g.*, T. 8349-8350, 8440-8444, 8659). None of the defendants testified in his own defense.

ARGUMENT

1. Petitioners claim that tape recordings secretly made by a government witness at the behest of the defense reveal that the prosecution team was guilty of misconduct warranting dismissal of the indictment. An examination of the record refutes the claim.[6]

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[6] Petitioners' joint appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court, contains a transcription of the tapes at pages D1 to D219 (here-

On April 18, 19, and 21, 1974, while the trial of this case was in progress, several conservations that occurred in the Brooklyn field office of the Department of Justice Organized Crime Strike Force were surreptitiously recorded by Joseph Pullman, an indicted co-conspirator who was severed prior to trial when he agreed to plead guilty and testify for the government (Pet. App. 20a-21a). Pullman made the recordings at the request of petitioner Gerry's attorney (T. 5294-5295). On April 24, with the trial still in progress, the defense disclosed the existence of the tapes to the court.[7] The jury was excused and the tapes were played (T. 5345-5350). At their conclusion the court denied a defense motion for mistrial, finding the allegations of prosecutorial misconduct "overstated" (T. 5347, 5351). The court of appeals agreed that none of petitioners' claims in respect to the tapes warranted a mistrial.

a. Petitioners' assertion (Pet. No. 1480, at 11-12; Pet. No. 1531, at 25) that the government suborned the witness Kraft to commit perjury is wholly unsupported by the record.

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inafter cited accordingly). We are also lodging a copy of the government's brief on appeal (hereinafter cited as "App. Br."), wherein appears, in more readable form, transcripts of the conversations relevant to petitioners' claims (including, in an addendum, the transcription of one conversation that does not appear in petitioners' appellate appendix).

[7] Pullman was granted immunity on May 1 (T. 6392) and testified as a government witness on May 2 (T. 6443); at that time, however, he recanted the testimony he had given against petitioners at the grand jury and gave no testimony helpful to the prosecution.

On Friday afternoon, April 19, 1975, Pullman recorded the conversations that occurred in the office of prosecutor Michael Pollack (Pet. App. 21a). The atmosphere was hectic, with numerous people wandering in and out as they left for the weekend (ten different voices appear on the tapes). At one point, the subject of Kraft's testimony arose. He had testified earlier that afternoon; on cross-examination, defense counsel had sought to establish that Kraft had considered himself the victim of a "tout scheme" rather than a co-conspirator.[8] In Pollack's office, Kraft insisted that "[t]his ain't nobody's tout scheme" (App. D59) and pointed out, in Pullman's presence, that when Pullman had first approached him on the subject of the fixed races, Pullman had unerringly predicted the results of a subsequent superfecta (App. D66). Several moments later FBI Agent Fanning asked (App. D70-D71), "All right, do you think he was touting Richard Perry? and the Vario's? Do you think he was touting the Vario people?" The conversation briefly touched on Vario's notoriety,[9] switched to interviewing a potential wit-

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[8] The district court explained the meaning of a "tout scheme" in its jury charge (Pet. App. 11a, n. 12):

> The implication in the cross-examination of Mr. Kraft was that Mr. Gerry was a con artist, who induced his betting clients to pay him money that he represented to be bribes but that he never actually bribed anybody and just put the money in his own pocket.

[9] Paul Vario of Brooklyn had been the subject of publicity in connection with investigations by state law enforcement officials into organized crime. His son, Peter Vario, was a co-defendant in this case.

ness then in Florida (App. D71), and then returned to the government's statistical evidence that petitioner Gerry's winnings were not the result of accident or talented handicapping.

It is on Agent Fanning's brief and passing remarks that petitioners base their claim that the government suborned perjury by telling Kraft how to testify on redirect examination in contradiction of petitioners' "tout scheme" defense. But a full reading of the transcript of the recordings of the April 19 conversations makes clear, as both the district court (T. 5352) and the court of appeals (Pet. App. 22a) found, that the government was not suborning perjury; rather, in preparing a witness for further trial proceedings, the government was merely attempting to learn the reasons why Kraft himself did not believe the "tout scheme" theory.

Furthermore, petitioners were in possession of the April 19 recordings when Kraft testified on redirect examination. Yet they did not, as they might have if the recordings demonstrated subornation of perjury, disclose the existence of the tapes in an attempt to impeach Kraft on recross examination. Nor did they recall Kraft after the existence of the tapes had been disclosed.[10]

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[10] After the tapes were revealed, the defendants sought to recall Kraft while the government's case was still being presented. The district court declined to allow the government's presentation to be interrupted, but stated that defendants could, of course, call Kraft during their case (T. 8248). This petitioners chose not to do.

In short, taken in context, Agent Fanning's remarks provide no foundation for the accusation that the government suborned the perjury of a witness.

b. Petitioner Perry (Pet. No. 74-1531, at 25) also accuses prosecutor Pollack of lying to the court in reference to his recollection of the Friday discussion with Kraft. This accusation likewise has no substance; in response to it we rely upon the ruling of the court of appeals on the issue (Pet. App. 22a): [11]

> We also find no merit in the allegation that the prosecutor, Michael Pollack, deliberately lied to the court as to the date on which he discussed with Kraft possible avenues of rehabilitation. Pollack admitted that he had spoken to Kraft on Friday, April 19, 1974, but that the meeting was chaotic and he did not receive a satisfactory response until Monday, April 22, 1974. Pollack volunteered that "for me, Friday through Monday is one day." While the tapes show a more extended Friday conversation between Pollack and Kraft than Pollack's statements may have led one to expect, Pollack was correct in stating that there were many other people milling about and that the meeting was rather chaotic. Further, there is no reason for Pollack to have misled the court as to whether he spoke to Kraft on Friday or Monday as it was clearly a collateral issue of no significance.

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[11] Even if Pollack had lied about the date upon which he had talked with Kraft, we fail to see any prejudice to petitioner Perry in result.

c. Petitioners also claim (Pet. No. 74-1480, at 11; Pet. No. 74-1531, at 23) that their convictions should be reversed because the government induced Pullman to testify by promising him that, due to prosecutor Pollack's influence over the district court, he would not be sentenced to imprisonment on his plea of guilty.

Certain government conduct in this respect was less than exemplary, but petitioners have again painted the scene darker than a full reading of the transcript warrants. Moreover, petitioners have not shown that anything done by the government prejudiced them or should lead to a reversal of their convictions for any other reason.

The statements to which petitioners refer occurred while the government was attempting to prepare Pullman, a recalcitrant witness, for trial by refreshing his recollection with his previous statements before the grand jury and to F.B.I. agents. It is evident from a reading of the transcripts that Pullman by that time was acting wholly on behalf of the defendants. He persistently sought reassurance that the government's recommendation on sentencing would have an influence on the district court, and he asked a series of leading questions designed to elicit damaging responses from the F.B.I. agents and the prosecutors. That he achieved some success is regrettable, but the government's conduct in this respect was not so discreditable as petitioners would have it. Agent Fanning told Pullman that promises could not be made to him (App. Br. 24, 29); Agent Walsh said

the same (App. Br. 26); prosecutor Pollack said that he could make no guarantees (App. Br. A5, 29) and that the district court would not invariably follow his recommendations on sentencing (App. Br. 32).

In any event, the court of appeals correctly ruled, after "a full reading of the transcripts" (Pet. App. 23a), that the district court was not obliged, on the basis of the statements of the government agents and prosecutors, to declare a mistrial or dismiss the indictment (Pet. App. 24a). Petitioners can point to no prejudice suffered by them as a result of the government's representations to Pullman: nearly all of the statements made were in response to his staged requests for reassurance and, in any event, when called to testify he recanted his grand jury testimony and gave no evidence helpful to the prosecution. Finally, this case presents no issue of persistent governmental disregard of constitutional rights, and *Mapp* v. *Ohio*, 367 U.S. 643, cited by petitioner Gerry (Pet. No. 74-1480, at 13) in support of the argument that this Court should reverse the convictions in this case in the exercise of its supervisory powers, is wholly inapposite.

2. Petitioner Perry also contends (Pet. No. 74-1531, at 14-17) that the trial court should have held a formal hearing to consider the mental competency of a government witness. On the morning of April 8, defense counsel requested a hearing on the competency of Bruce Cussell, a government witness, before Cussell testified. The court replied that it would consider the request. The prosecutor said that he

had received a letter that morning from a doctor indicating that the witness was competent to testify (T. 2407-2408). That afternoon counsel for Perry stated (T. 2600):

> I would like to ask your Honor when I could have a psychiatrist here tomorrow in connection with the voir dire examination as to the competence and sanity of a witness by the name of Bruce Cussell.

The Court responded: "Have him here at two o'clock" (Tr. 2600).

The following morning the government supplied the defense with a copy of the letter previously referred to (Gov. Exh. 413), from one Dr. Parlade, indicating that Cussell had no memory impairment and that his "mental condition would not in any way effect [*sic*] his testimony" (T. 2601-2608). Perry did not, however, supply a psychiatrist, nor indeed did he ever broach the subject of a hearing on Cussell's competency again.

On April 15, Cussell testified on direct examination without objection (T. 3567). In the middle of cross-examination, the defense moved that Cussell be disqualified "on the grounds of mental incompetence" (T. 3765), but the court found the witness competent and denied the motion (T. 3766-3768). The next morning the court reiterated that the witness was competent to testify and that the defense objections went to credibility rather than competency (T. 4029-4030):

> I think the attack on mental competence was pretty well wiped out by the subsequent defense counsel who cross examined and got quite comprehensible and intelligent, whether credible or not, answers to their questions on cross-examination.

On this record the claim that the court erred in failing to hold a formal competency hearing has no substance. As the court of appeals ruled (Pet. App. 9a) and as petitioner Perry concedes (Pet. No. 74-1531, at 15), the form of the inquiry into the competency of a witness is a matter for the district court's discretion. Here, opportunity was offered the defense to present psychiatric testimony on the issue, yet no such evidence was produced. The only medical opinion offered was that Cussell was competent to testify, and the district court's ruling on competency came after the court had observed him on both direct and cross examination. Petitioner does not challenge the court of appeals' ruling (Pet. App. 10a) that the district court's finding of Cussell's competency as a witness was not clearly erroneous. *A fortiori*, it was not error for the district court to fail to hold a hearing on competency.

3. Petitioner Perry also urges (Pet. No. 74-1531, at 22-23) that the district court erred in admitting the testimony of a mathematician to counter the defense theory that the $2¼ million winnings in a three or four month period were the result of Gerry's handicapping skills. This claim was properly re-

jected by the court below, on whose opinion we rely (Pet. App. 19a-20a):

> While there may have been an overkill in the mathematical, statistical, and graphic evidence introduced in this case, certainly sufficient evidence of actual bribery was adduced to refute the contention that the jury verdict was based on mathematical probabilities and not on actual evidence of bribery. In any event, this testimony was introduced for purposes of meeting defendants' argument that Gerry's apparent success was attributable to his handicapping skills and the judge gave appropriate cautionary instructions to remind the jury that Gerry's skills as a handicapper reflected his special knowledge of the field and not simply a mechanical application of a rule excluding horses bearing the longest odds.

4. Petitioner Perry contends (Pet. No. 74-1531, at 18) that references to his connection with organized crime denied him due process of law.

During the cross-examination of government witness Kraft, the defense had attempted to establish that Gerry was engaged in a "tout scheme" rather than sports bribery and that Kraft's testimony was a recent fabrication. To rebut these claims the government on redirect asked Kraft whether, at the time, he had believed that he was involved in a "tout scheme"; Kraft replied that he had not, because too many horses were finishing in the order predicted and because Pullman had informed him that Gerry was also betting with Perry, "who is connected with

a fierce mob in Brooklyn * * * and I felt that Mr. Gerry would not want to play tout schemes with people like that" (T. 4925-4929). Both immediately before and after this testimony the court instructed the jury that it was admissible only as to Kraft's state of mind (T. 4926) and "is not to be taken as evidence that anyone belongs to any mob" (T. 4930).

Subsequently Pullman testified and related his grand jury testimony. In attempting to refresh his recollection, the government asked him about statements he had made to FBI agents. In one of them he had referred to "Richie" as "the son of a made man in Brooklyn" (T. 6853). Pullman denied having made such a statement and said that he did not know the meaning of the term "made man" (T. 6853-6854).

Marvin Proman, a groom and trainer, also recanted his grand jury testimony and was subsequently questioned by the government about his prior statements to the FBI, in one of which he had referred to Perry as a "bookmaker." Proman testified that he did not "recall saying that" (T. 1830).

Contrary to petitioner's claim, these three isolated references, in the course of an eleven-week trial filling 11,000 pages of transcript, did not allow the government to establish his "guilt through his reputed association with * * * the 'Mafia'" (Pet. No. 74-1531, at 18). The expression "made man" is obscure and the term "bookmaker," as the court of appeals noted (Pet. App. 13a), has no inherent organized crime connotation. As to Kraft's mention of

a "fierce mob," and the cumulative effect of these isolated references, we submit that the court of appeals was correct in ruling as follows (Pet. App. 13a-14a):

> [I]n light of the attempt on cross-examination to show that Kraft was being victimized by a "tout" scheme, the elicitation of the two reasons why Kraft did not believe it was a "tout" scheme appears to have been a reasonable and permissible response by the government. Again, the trial court immediately gave the proper limiting instruction that the testimony was to be considered only as it related to Kraft's state of mind, not as evidence that any of the defendants was a member of any mob. Thus each of the three contested references was properly admitted. We fail to see how any one of them standing alone or all three taken together deprived the appellants of a fair trial.[12]

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[12] In an attempt to show that he was prejudiced by these references to organized crime, petitioner Perry asserts that "some of the jurors" informed his attorney after trial that "Perry was convicted only because they thought that he was an enforcer for the mob" (Pet. No. 74-1531, at 21). Petitioner made such a claim to the district court in a post-trial motion for acquittal. It was then, as now, unaccompanied by an affidavit from any juror, or any other evidence that would lend substance to this claim. The district court denied the motion from the bench, and petitioner advances no reason why the district court's ruling was in error. Furthermore, both before the district court and in the court of appeals, petitioner's claim was that "one of the jurors" (see petitioner Perry's brief on appeal, at 39) had said that his conviction was assertedly tainted, whereas now the claim has risen to "some * * * jurors." Given petitioner's complete failure to substantiate it, we submit that this claim is entitled to no weight.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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